



June 5, 2001

Ms. Laura Garza Jimenez
County Attorney
County of Nueces
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2001-2331

Dear Ms. Jimenez :

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148032.

The Nueces County Human Resources Department (the "county") received a request for "all the applications, and subsequent submitted documents" in reference to county job posting 02261-1, as well as a list of names of "the board members who made the decision as to why [the requestor] was not considered for this position." You claim that the requested information is excepted from disclosure under sections 552.102, 552.103, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You inform us that you have advised the requestor that his own application and subsequent submitted documentation is available for his copying and inspection. We assume that you have released that information. You also inform us that with regard to the hiring decision request, there was no board involved, and that the decision was made at the individual department level. Hence, you assert that you have no documents responsive to the request. We note that chapter 552 of the Government Code does not require a governmental body to make available information which did not exist at the time the request was received. Open Records Decision No. 362 (1983); *see* Open Records Decision No. 452 (1986) (document not within chapter 552's purview if it does not exist when governmental body receives a request for it). Nor is a governmental body required to prepare new information to respond to a request for information. Open Records Decision Nos. 605 (1992), 572 (1990), 416 (1984). However, a governmental body has a duty to make a good faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 at 8 (1990). If the county holds information from which the requested information can be obtained, the county must provide that information to the requestor. Gov't Code §§ 552.301, .302.

Next, we address your claim under section 552.102. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101 of the act.¹ See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. See *id.* at 683. The responsive information in Exhibit 3 contains applications for the posted position, employment histories, educational background, training and job experience information, and some commendations and certificates of appreciation. We must conclude that this is not the type of information which is highly intimate or embarrassing under the test in *Industrial Foundation*. See *id.* at 683. Moreover, this office has found that the type of information contained in the responsive information is available to the public. See Open Records Decisions Nos. 342 (1982), 329 (1982) and 298 (1981) (the qualifications of a public employee, including his experience, licenses and certificates, professional awards and recognition, tenure, salary, educational level, membership in professional organizations, and previous employment are available to the public). Accordingly, we conclude that the information is not confidential under section 552.102.

We next address your assertion that the information is excepted under section 552.103. Section 552.103 of the Government Code, the "litigation exception," excepts from disclosure information:

[R]elating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

¹Information is excepted from the requirements of section 552.021 if it is information considered to be confidential by law, either constitutional, statutory, or by judicial decision.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. To show that section 552.103 is applicable, the county must demonstrate that 1) litigation is pending or reasonably anticipated and 2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the county must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). This office has found that where a governmental body receives a demand letter from an attorney which threatens suit, litigation is reasonably anticipated for purposes of section 552.103. Open Records Decision No. 346 at 2 (1982). This office has also applied section 552.103 where a prospective plaintiff threatened to sue on several occasions and hired an attorney. Open Records Decision No. 288 at 2 (1981). You indicate that the requestor has filed a departmental grievance, and that he is to be represented by an attorney in the grievance process. We do not believe that the grievance hearing constitutes litigation for purposes of section 552.103. Therefore, since the county has not met its section 552.103(a) burden, we conclude that the submitted information may not be withheld under this exception.

We next address your claim under section 552.117. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). For employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made, a governmental body must withhold such personal information addressed by that section. In addition, section 552.117(2) excepts from disclosure the same types of personal information in the case of employees who are peace officers as defined by article 2.12 of the Code of Criminal Procedure, regardless of whether such employees make such an election under section 552.024. *See* Gov't Code § 552.117(2). Section 552.117 also includes the employees' *former* home addresses and telephone information from disclosure. *See* Open Records Decision No. 622 (1994). You inform us that the information in Exhibit 3 is that of peace officers as defined by article 2.12 of the

Code of Criminal Procedure and an employee who is not a peace officer. You further state that the non-peace officer employee had elected under section 552.024 to keep his personal information confidential in 1992. The submitted documentation does contain information relating to the employees' home addresses, home telephone numbers, and social security numbers. Based upon your representations, we conclude that section 552.117(1) is applicable in the case of the employee who is not a peace officer, and that you must redact all information which relates to his home address, home telephone number, and social security number. Likewise, we conclude that section 552.117(2) is applicable in the case of the peace officer employees, and that you must redact all information in Exhibit 3 which relates to their present or former home addresses, home telephone numbers and social security numbers.

The information also contains driver's license numbers and copies of drivers' licenses, which you assert are confidential under section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

You must withhold the Texas driver's license numbers and copies of drivers' licenses under section 552.130.

In summary, you must redact the current or previous home addresses or home telephone numbers and social security numbers of all the county's employees who are peace officers under section 552.117(2). You must also redact the home address, home telephone number and social security number of the employee who is not a peace officer under section 552.117(1). You must also redact all drivers' license numbers and copies of drivers' licenses which appear in the documentation under section 552.130. All of the remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

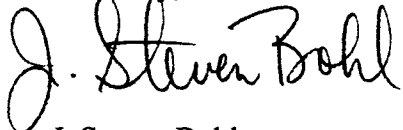
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "J. Steven Bohl". The signature is written in a cursive, flowing style.

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/sdk

Ref: ID# 148032

Encl: Submitted documents

cc: Mr. Elmer Cox, Jr.
8033 SPID, #1921
Corpus Christi, Texas 78412
(w/o enclosures)